APPENDIX A

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, how-*

ever, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Section 11 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1127, and by the Finality Act of 1959, 73 Stat. 243, 15 U.S.C. 21, provides in part:

(b) Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations. * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be

set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

* * * * *

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. * * *

* * * * *

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; * * *.

APPENDIX B

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS

FTC docket No.	Title	Date of order	Synopsis
8093	*Chun King Sales, Inc.*	3- 4-64	Robinson-Patman case. The Commission denied respondent's motion to reopen, to vacate a cease-and-desist order or to stay the effective date of the order until such time as "its effect will not be to place respondent in an inequitable position competitively in the sale and distribution of the products covered by the order." Respondent alleged that "In the Oriental foods industry there are some sixteen competitors of varying sizes * * *."
7817	*United Biscuit Company of America.*	4-10-64	Robinson-Patman case. The Commission denied respondent's motion to withdraw and stay re-entry of its order "until a determination has been made as to whether the respondents in *National Biscuit Company*, Docket No. 5913, and *Sunshine Biscuits, Inc.*, Docket No. 6191, are in compliance with the respective cease and desist orders issued previously by the Commission against these companies."
8596	*Watchbands, Inc., et al.*	5-21-64	The Commission denied respondents' motion to vacate their default and to reinstate the case for trial on the merits, a cease and desist order having been issued on February 3, 1964. Respondents alleged, among other things, that "there are a number of manufacturers engaged in the watchband industry who are much larger manufacturers who have not been directed to cease and desist their importation of watchbands with the resultant discrimination against the respondent."
7462	*Pacific Molasses Company.*	7-20-64	Robinson-Patman case. The Commission denied respondent's request to reopen the proceedings on the ground, *inter alia*, that the order should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which was under a somewhat similar Commission order, had left the business and had been replaced by National Molasses Company, "against whom there is no cease and desist order."
7604	*Dayco Corporation.*	8- 5-64	Robinson-Patman case. The Commission, in issuing the order to cease and desist, denied respondent's request for a stay which asserted that it will be placed at a great competitive disadvantage until the Commission proceeds against competitors who grant similar discounts.

FEDERAL TRADE COMMISSION DECISIONS SINCE JANUARY 1, 1964, REFUSING TO STAY ORDERS—Continued

FTC docket No.	Title	Date of order	Synopsis
7866	*Southern Fruit Distributors, Inc.*	3-11-65	Robinson-Patman case. The Commission denied respondent's petition to reopen, which was based on the Commission's decision in two other cases and the fact that "the continuation in force of this consent cease and desist order puts Southern Fruit at a real disadvantage vis-à-vis a competing company."
C-788	*Lafayette Radio Electronics Corp.*	3-24-65	The Commission denied respondent's motion to suspend the effectiveness of a consent order until similar orders are issued and become effective against three competitors.
8656	*Texas Industries, Inc.*	4-14-65	The Commission denied respondents' motions "to suspend the proceeding pending completion of an industry-wide investigation, inquiry, or other action by the Commission."
8657	*Mississippi River Fuel Corporation.*		
6048	*Schenley Industries, Inc., et al.*	10-25-65	The Commission denied respondents' petition to reopen based on the contention, among others, that respondents' "competitors are not under similar restrictions."
8038	*Graber Manufacturing Co., Inc., et al.*	12-13-65	Robinson-Patman case. The Commission denied respondents' motion to dismiss or suspend the proceedings, in which the respondents pleaded, among other things, that the Commission has issued a complaint in another, more comprehansive, action "involving in essence the very factors upon which liability is premised against the respondents herein."
C-607	*Dexcon Corporation, et al.*	1-19-66	The Commission denied respondents' motion, which contended in essence that the Commission's promulgation of Guides Against Deceptive Labeling and Advertising of Adhesive Compositions indicated an intention to deal with the matters involved on an industry-wide, voluntary-compliance basis, and that it would be inequitable to place respondents alone under an order before determining whether the industry guides would secure compliance.
File 661-0806	*Lehigh Portland Cement Company.*	3- 3-66	The Commission denied (1) respondent's petitions to expedite the Commission's industry-wide inquiry and, pending promulgation of a policy to guide the industry, (2) to stay further action in the particular case.
C-229	*George Frost, et al.*	8-10-66	The Commission denied respondents' petition to reopen and set aside which alleged, among other things, that action had not been taken against their competitors.

APPENDIX C

CORRESPONDENCE BETWEEN COUNSEL FOR RESPONDENT AND COUNSEL FOR THE COMMISSION [1]

NOVEMBER 16, 1964.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR CHAIRMAN DIXON: On August 4, 1964, the Commission denied a petition filed on July 20, 1964, for a stay of the Commission's secondary line 2(a) order entered on June 12, 1964 against Universal-Rundle Corporation.

The stay was requested to permit the Commission to investigate the industry-wide practice by plumbing fixture manufacturers of granting truckload discounts. Accompanying the petition were price lists of each of Universal-Rundle's principal competitors showing that each such fixture manufacturer currently charged approximately 18% less for certain plumbing fixtures shipped in truckload quantities than the prices charged for identical fixtures shipped in less than truckloads.

In Docket 8070 the Commission concluded that a truckload differential by Universal-Rundle Corporation averaging only 10% between customers reselling at the same functional level, was sufficient to cause the probability of competitive injury and was an illegal price discrimination when one or two of respondent's

[1] Parts of this correspondence, not related to the present case, have been omitted. These parts concern information relating to another Commission investigation which is confidential, under Rule 1.133 of the Commission's rules of practice.

customers in a single trade area could not avail themselves of the lower truckload price.

In denying respondent's petition, the Commission clearly indicated that the higher truckload discounts of 18% of American Standard, Elger, Crane Co., Briggs Mfg. Co., Kohler and Rheem Mfg. Co. were prima facie illegal, provided (a) a customer buying in truckloads competed with a customer buying at the higher truckload price, and (b) the less than truckload customer was unable to avail itself of the truckload discount because quantities involved were beyond such a customer's buying capabilities. In substance therefore, while the Commission refused to stay the order in Docket 8070, in doing so it isolated the precise factual information needed to proceed against respondent's competitors for engaging in the identical pricing practice for which Universal-Rundle Corporation was placed under an order.

As counsel for Universal-Rundle Corporation, it is requested that you advise us at your earliest convenience of the specific action which has been taken by the Commission to obtain the factual information the Commission indicated was necessary before any proceedings were considered under Section 2(a) of the Act against Universal-Rundle's competitors, the present status of an industry-wide investigation with regard to these pricing practices, and when the Commission may be expected to complete such an investigation.

* * * * *

Very truly yours,

FRANK C. MCALEER
(For Kahn, Adsit & Arnstein).

DECEMBER 2, 1964.

Re Corresp. File No. 7493.
FRANK C. MCALEER, Esquire,
Kahn, Adsit & Arnstein,
120 South LaSalle Street,
Chicago, Illinois. 60603.

DEAR MR. MCALEER: Your letter to the Chairman dated November 16, 1964, has been referred to me. In that letter you requested advice of the specific action which has been taken by the Commission regarding allegations by your client, Universal-Rundle Corporation, respondent in Docket 8070, that competitors are granting truckload discounts in connection with the sale of plumbing fixtures * * *

With reference to the first portion of your letter, you were, of course, advised by our answer to your petition for a stay of the order in Docket 8070 that the Commission's staff is not aware of any information indicating that there is a reasonable probability that any other manufacturer is selling plumbing fixtures at truckload discounts to jobbers who in fact compete with other jobbers buying fixtures from the same manufacturer and who are economically precluded from purchasing in truckload lots. We were cognizant of the affidavit of your client's vice president, attached to your original petition. That affidavit, however, merely stated that, because other manufacturers' published price lists provide truckload discounts, such manufacturers "may" be selling fixtures at different prices to competing purchasers.

If your client possesses any more concrete information indicating that any other manufacturer is in fact selling plumbing fixtures at truckload discounts to some customers while other competing customers are economically precluded from buying in such quantities, you are invited to submit such information, and

we shall gladly consider this matter further. I would strongly suggest that any such further information include the specific trading areas wherein the alleged discriminations are resulting.

In the present posture of this matter, however, an investigation such as you requested would require that a substantial portion of the Commission's limited funds and manpower be committed to a nationwide investigation of the pricing practices of some six major plumbing fixture manufacturers, each of which apparently deals with hundreds of customers. It is not considered appropriate to make such a commitment on the bare possibility that published price lists "may" be resulting in sales at different prices to competing purchasers somewhere in the United States. Not the least of the reasons underlying our reluctance to initiate an investigation such as you requested solely on the basis of the information thus far submitted by your client is our understanding that plumbing fixture manufacturers generally direct their principal sales efforts toward accounts which are capable of purchasing a substantial portion of their requirements in truckload quantities.

* * * * *

Very truly yours,

STANLEY M. LIPNICK.

JANUARY 4, 1965.

STANLEY M. LIPNICK, Esq.,

Trial Attorney, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: I have received your letter of December 2, 1964, but due to my extended absence from the city I have been unable to respond until this time.

Your December 2, 1964 letter was in reply to our inquiry requesting information with respect to the action the Commission has taken to investigate the industry-wide practice by plumbing fixture manufacturers of granting truckload discounts, brought to the attention of the Commission on July 20, 1964.

In your December 2, 1964 letter you advised me, as counsel for Universal-Rundle Corporation, respondent in Docket 8070 that the Commission has neither undertaken, nor does its presently intend to institute, any investigation of Universal-Rundle's competitors for engaging in the precise discriminatory pricing practice which the Commission ruled was a violation of Section 2(a) of the amended Clayton Act by our client. We had previously furnished the Commission with price lists of U–R's six competitors, showing that these plumbing fixture manufacturers granted average truckload discounts of approximately 18% to buyers of such quantities. An average truckload discount by Universal-Rundle of but 10% in 1957 was sufficient for the Commission to conclude in its June 1964 opinion in Doc. 8070 that competition on the buyer level was adversely affected.

In your letter you state it is "our understanding that plumbing fixture manufacturers generally direct their principal sales efforts toward accounts which are capable of purchasing a substantial portion of their requirements in truckload quantities." It is

principally for this reason that you advised us the Commission does not consider it appropriate to expend its "limited funds" and "manpower" to undertake any investigation of Universal-Rundle's competitors. In short, the Commission's position is that Universal-Rundle, a manufacturer whose sale of "U–R" fixtures is but approximately 5% of the total sales of plumbing fixtures in the industry, a company which has incurred substantial operating losses during the past three years, is the *sole* plumbing fixture manufacturer distributing fixtures to some buyers who were incapable of buying their fixtures in truckload quantities. This apparently means the Commission will ignore the substantial price discriminations between truckload and less than truckload quantities charged by Universal-Rundle's competitors because of the above-quoted "understanding" about the capability of U–R competitor's customers to buy in truckloads.

Your "understanding" is not only *not* substantiated by the record in Docket 8070 but, in our opinion, is flatly contradicted by the evidence therein.

We invite your attention to the testimony of a regional sales manager of a competitor of Universal-Rundle (Tr. 1623). In this testimony the names of at least ten customers of another plumbing fixture manufacturer in the Philadelphia and Camden areas, were given. Two of these customers, Hajoca Corporation and Camden Plumbing, both located in Camden, N.J., also bought plumbing fixtures from Universal-Rundle Corporation. Neither Camden Plumbing nor Hajoca bought truckload quantities from Universal-Rundle. Both Hajoca and Camden Plumbing were among the customers of our client the Commission deemed "incapable" of buying in such truckload quantities.

At lease [*sic*] three other Universal-Rundle cus-

tomers, Freidman, Black & Brown, and Richmond Plumbing, all located in Philadelphia, did not, or according to the Commission's findings, could not buy in truckloads. Each of these three customers purchased plumbing fixtures from one or more of our client's competitors (Tr. pp. 514, 1099, 1063, 1100). If these customers of Universal-Rundle, namely, Camden, Hajoca, Black & Brown, Freidman, and Richmond Plumbing, were incapable, or economically precluded from buying in truckloads from our client, as you successfully convinced the Commission, we are at a complete loss to understand how this economic bar does not likewise apply to their ability to purchase truckload quantities from their other suppliers of plumbing fixtures, particularly since the Commission found that as to each of these customers, Universal-Rundle was the principal source for plumbing fixtures.

While it might be considered presumptuous on our part to suggest the most expeditious manner, and least expensive—both in funds and manpower—through which the Commission could act on our client's complaint, we are however mindful of the fact the Commission took four years to investigate Universal-Rundle, although initially the investigation was entirely unrelated to the matter of truckload discounts.

To avoid such a protracted investigation of Universal-Rundle's competitors, the Commission might find that most of the information it believed was necessary to constitute a prima facie violation by U–R's competitors (see Commission opinion of August 10, 1964) could be quickly obtained through issuance of Commission orders for special reports from each of the six plumbing fixture manufacturers. For example,

these reports could require production of the following information:

(a) The names, and location of all purchasers during the year 1964 in a representative number of trading areas. (The Commission sought such information for at least 10 trading areas during its proceeding involving Universal-Rundle. A similar number might suffice here, including each trading area within which the manufacturer has a plant or warehouse. See Tr. p. 1623 in D-8070, competitor of Universal-Rundle maintained a warehouse in Philadelphia and sold to Hajoca and Camden Plumbing, both non-truckload buyers of Universal-Rundle).

(b) All price lists in effect during the year 1964.

(c) Copies of all 1964 invoices to each customer included in (a) above.

(d) The minimum qualifications, both in units and weight for a buyer to obtain a truckload discount, and

(e) The functional level or levels at which the customer in (a) above resold or distributed each manufacturer's plumbing fixtures.

It is therefore urgently requested that your Bureau reconsider its refusal to undertake an investigation of the industry-wide practice of granting truckload discounts, and institute immediate action so as to minimize the impact a final Commission order would have upon Universal-Rundle Corporation.

Very truly yours,

FRANK C. MCALEER,
(For Kahn, Adsit & Arnstein).

JANUARY 11, 1965.

Re Corresp. File No. 7493.
FRANK C. MCALEER, Esquire,
Kahn, Adsit & Arnstein,
120 South LaSalle Street,
Chicago, Illinois 60603.

DEAR MR. MCALEER: This will acknowledge receipt of your letter of January 4, 1965, in which you renewed your request that a rather comprehensive investigation be conducted of the pricing practices in ten market areas of six of the largest manufacturers of plumbing fixtures.

I am confident that you realize that the conduct of such an investigation, by whatever investigational methods, will entail a most substantial expenditure of funds and manpower, and I am equally certain that you appreciate our reluctance to undertake such an expenditure in the absence of some reliable indication that violations of statutes administered by the Commission would probably be disclosed by such investigational effort.

As I understand Section 2(a) of the amended Clayton Act and the Commission's opinion in Docket No. 8070, the truckload discounts involved in Docket No. 8070 were not unlawful *solely* because some purchasers were incapable of buying in such quantities, but rather because the actual effect of such discounts was to confer lower prices upon some purchasers than upon competitors. As I said in my letter of December 2, 1964:

> If your client possesses any more concrete information indicating that any manufacturer *is* in fact selling plumbing fixtures at truckload discounts to some customers while other competing customers are economically precluded from buying in such quantities, you are invited

to submit such information, and we shall gladly consider this matter further * * *. [Emphasis supplied.]

We are reluctant to initiate an investigation at this time in reliance upon the evidentiary findings in Docket No. 8070 mentioned in your letter because those findings involve facts which were true eight years ago and which may now be different (for example, you are no doubt familiar with Mr. Backner's testimony in Docket No. 8070 that one of the "disfavored" purchasers was subsequently cut off by your client).

If your client has any information indicating that other manufacturers of plumbing fixtures are now selling fixtures to competing purchasers, or even to purchasers located in the same area, at different prices, whether by the operation of truckload discounts or otherwise, you are invited to submit such information, and this matter will be reconsidered. In the absence of such information, it is at least difficult for us to understand the manner in which your client may be disadvantaged competitively by enforcement of the order in Docket No. 8070.

Very truly yours,

STANLEY M. LIPNICK.

JANUARY 25, 1965.

STANLEY N. [*sic*] LIPNICK, Esq.,
Trial Attorney, Bureau of Restraint of Trade,
Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: In your letter of January 11, 1965 replying to my letter of January 4, 1965, you have advised me that the Commission still will not undertake any investigation of the substantial discriminations in price granted by competitors of Universal-Rundle Corporation, notwithstanding the evidence in Docket 8070 concerning sales by competitors of Universal-Rundle Corporation to customers the Commission found were unable to purchase in truckload quantities. You would disregard this evidence in Docket 8070 concerning the ability of certain customers to buy in truckloads from Universal-Rundle's competitors on the grounds that such facts may not be "true" at the present time, specifically citing testimony of Mr. Backner.

It now appears that your understanding about the type of accounts to which plumbing fixture manufacturers direct their sales efforts, i.e., "those capable of purchasing substantial portions in truckload quantities," and your refusal to start any industrywide investigation is based *solely* upon the testimony of Mr. Backner in Docket 8070. The testimony of Mr. Backner upon which you rely was to the effect that certain of his company's customers whom the Commission found to be "disfavored purchasers" were cut off by Universal-Rundle subsequent to 1957.

In my opinion, the cited testimony of Mr. Backner does not in any way establish that any of the five "disfavored" customers referred to in my letter of January 4, 1965 has not continued to purchase from Universal-Rundle's competitors in less than truckload quantities; rather, this testimony only establishes

there was no necessity for entrance of an order against our client, particularly one nationwide in scope, since Universal-Rundle and, insofar as the record is concerned, only Universal-Rundle had terminated certain "disfavored" customers.

I invite your attention to the exhibits which were attached to our petition for stay of the Commission's order. These exhibits included current price lists of Universal-Rundle's six principal competitors. These price lists show that each manufacturer has a freight allowance policy whereby freight at the truckload rate is allowed on all purchases in excess of 200 pounds.

In your answering brief in Docket 8070 you argued, in justification of a broad nationwide order, that the identical freight allowance policy of our client supported your contention that a customer would not normally buy in truckloads (Appeal Brief, p. 35) and that our client's freight policy was put into effect in anticipation of "substantial business nationally" in less than truckload quantities (A.B., p. 36). Would not the same argument be logically applied to each of Universal-Rundle's competitors employing, *at the present time, the identical freight policy?*

You also argued (A.B., p. 36) "* * * respondent's practice of granting special discounts for purchases in truckload quantities seems geared to substantial purchases in less than truckload quantities on a nationwide basis"—and to support this argument you gave the following reasons:

> "Respondent's basic price books in effect nationally, contain no mention of truckload discounts" (the same is true of each of the price books of Universal-Rundle's competitors—see Exs. AA, BB, CC, DD, EE, and FF to our Petition for Stay), and

"The only price announcement circulated generally * * * limits the special prices to truckload quantities." (This is similarly true of the competitors' special truckload prices—see Exs. A, B, C, D, E, and F to Petition).

With the arguments briefly summarized above, you convinced the Federal Trade Commission that Universal-Rundle's truckload and less than truckload pricing practices were existent nationwide and that Universal-Rundle was in fact discriminating in price in all sections of the country through its truckload discounts. I am unable to understand how you could so argue before the Commission and vigorously contend that a broad nationwide order be entered against my client because of its freight policy and manner of publishing its truckload discounts, yet within a few months after issuance of this nationwide order, you now take the position that the identical freight policy and manner of communicating their differential pricing by our client's competitors, is not a sufficient basis to cause the Commission to undertake even an investigation of these competitors.

If, of course, you are still of the view that Mr. Backner's testimony with regard to the type of accounts *our client selects* obviates the necessity of any investigation of Universal-Rundle's competitors, this conviction, in all fairness, would require a filing of a motion by your Bureau with the Commission to rescind the Commission's order in Docket 8070. If upon reflection you now believe that the freight policy and methods of price announcements employed by Universal-Rundle Corporation's competitors are not "geared to substantial purchases in less than truckload quantities on a nationwide basis", i.e., not enough even to prompt an investigation, it would be in the public interest for counsel to file a joint motion with

the Commission requesting specific geographic limitations of the Commission's order in Docket 8070.

I would appreciate an early reply to this letter. Neither the appendix nor briefs have been filed in the petition for review in Docket 8070. In the event you indicate your Bureau would agree to modification or withdrawal of the order, it might obviate further expense to our client and conserve both the Commission's manpower and funds, because under such circumstances we would probably consider it feasible to withdraw our appeal.

Very truly yours,

FRANK C. MCALEER.

FEBRUARY 5, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Gluck, Wietzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: This is in reply to your letter of January 25, 1965.

Initially, this Bureau will not consent voluntarily to a withdrawal of the order entered by the Commission in Docket No. 8070, nor to the limitations suggested in your letter. Secondly, your comments regarding the apparent basis of our understanding of manufacturers' present principal sales efforts does not appear to me to reflect a fair reading of my letter of January 11.

Despite your claim that our refusal to undertake a costly and sweeping investigation of a large number of major manufacturers is based *"solely"* upon Mr. Backner's testimony in Docket No. 8070, the fact is, as you have consistently been informed, that our reluctance is based upon your complete failure to submit any information indicating that a reasonable probability exists that competitors' discount schedules are now discriminatory in their operation (*i.e.*, confer truckload discounts upon some purchasers who in fact compete with other purchasers lacking the capacity to buy any portion of their requirements in truckload quantities). Perhaps it would be well to summarize briefly the kind of information we have in mind as well as our reasons for thinking that such information is now in the possession of your client if your client's competitors are in fact engaging in the type of violations which you requested us to investigate.

It is our understanding that your client has a sales force engaged in the nationwide marketing of plumb-

ing fixtures produced by your client. It is our further understanding that your client's products (other than those sold to Sears) are marketed by your client principally or exclusively to jobbers handling plumbing fixtures. We assume that such a sales force, in the normal performance of its duties, would acquire substantial knowledge of the general market in which its products are sold, including the identity of jobbers selling competitive products. We further assume that such general market knowledge would encompass at least some notion of whether particular jobbers handling competitive products enjoy or do not enjoy sales volumes capable of supporting purchases of plumbing fixtures in truckload quantities.

If your client has any such information indicating that any competitor is selling plumbing fixtures to jobbers in any trading area, some of whom are capable of buying in truckload quantities while others are not, you are invited to submit such information, and your request that an investigation be conducted will be reconsidered. If your client does not have information regarding the ability of jobbers of competitive fixtures to purchase in truckload quantities, your request that an investigation be conducted will be reconsidered nonetheless if you inform us of the trading areas in which any of your client's competitors regularly sell fixtures to five or more jobbers. If your client does not possess even that information, kindly so advise us, and your request that an investigation be conducted will be reconsidered in light of such advice.

In any event, we firmly adhere to our previously announced positions regarding what is and what is not established by the evidence of record in Docket No. 8070, and there does not seem to be much point in further engagement in debating issues which were

raised and decided in Docket No. 8070 and which were at least raised before the Commission by your petition for a stay of the order. I should remind you, in this regard, that the Backner testimony regarding discontinuance of sales to four of the five jobbers referred to in your letter is not in the record of Docket No. 8070, having been ordered stricken by the hearing examiner and no appeal from such ruling having been made to the Commission.

I trust that this letter will explain our position to you with clarity. If you see fit to submit any or all of the information or advice mentioned above, we shall reconsider your request that your client's competitors be investigated.

Very truly yours,

STANLEY M. LIPNICK.

MARCH 4, 1965.

Re FTC Correspondence File No. 7493.

STANLEY M. LIPNICK, Esq.,
Division of Discriminatory Practices, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C.

DEAR MR. LIPNICK: In your letter of February 5, 1965 in the above matter, you notified us that the Commission would reconsider its refusal to institute an investigation of the pricing practices of plumbing fixture manufacturers in selling truckload quantities of fixtures at lower prices than fixtures sold in less than truckload quantities. Such reconsideration would be given if our client, Universal-Rundle Corporation, furnished the names of at least five customers in the same trading area regularly purchasing fixtures from any competitors of Universal-Rundle.

Enclosed as Exhibit A to this letter is a list of American Standard's customers in 13 trading areas of the country. Exhibit B is a list of Kohler customers in 11 trading areas. We are advised by our client that the customers listed in Exhibits A and B regularly purchase fixtures from the indicated manufacturer.[2]

You will note that American Standard sells fixtures to independent customers, and in some of the trading areas also sells through "Amstan". The latter is a division of American Standard, distributing fixtures to plumbers, builders, and to a certain extent wholesalers. We have been advised by our client that in the past prices charged by the Amstan Division in selling to its customers have been lower than prices charged for the same fixtures sold by American Standard to wholesalers whose customers compete

[2] For purposes of economy, we are not reprinting the exhibits attached to this letter.

with accounts buying from Amstan. Any investigation of American Standard's pricing practices should, therefore, include the prices paid by Amstan's customers, as well as the independent customers buying from American Standard.

We would appreciate your notifying us whether, on the basis of the information submitted herewith, when considered with the matters discussed in our previous correspondence, the Commission will now institute an investigation and act upon our previous complaints.

Very truly yours,

FRANK C. MCALEER.

Encls.

MARCH 12, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Cluck, Weitzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: I have received your letter of March 4, 1965, which relates to previous correspondence between us. I shall reply in further detail as soon as I have had an opportunity to study your letter and to secure whatever approval may be required for my recommendations. In the meantime, it would be of considerable assistance to us (and would contribute substantially to any investigation which we do undertake) if you would advise me of the reasons, if any, which your client has for believing that some of the accounts listed in the exhibits to your letter buy fixtures from American Standard or Kohler in truckload quantities, and of your client's reasons, if any, for believing that some of those accounts do not buy any fixtures from either manufacturer in truckload quantities. If your client has no idea of the quantities in which the listed accounts buy, please advise me to that effect.

Very truly yours,

STANLEY M. LIPNICK,
Attorney.

APRIL 19, 1965.

Re Corresp. File No. 7493.

FRANK C. MCALEER, Esquire,
Kahn, Adsit, Arnstein, Gluck, Weitzenfeld & Minow,
120 South LaSalle Street, Chicago, Illinois 60603.

DEAR MR. MCALEER: This is in further reply to your letter of March 4, 1965, in which you reiterated your request that the Commission conduct an investigation of the pricing practices of American Radiator & Standard Sanitary Corporation and The Kohler Company. Through our established liaison with the Antitrust Division, Department of Justice, we have been advised that such an investigation would conflict with an investigation now being conducted by the Antitrust Division. Accordingly, initiation of the action you requested does not seem appropriate at this time.

* * * [W]e are already investigating alleged violations of Sections 2(d), and 3 of the Clayton Act, as amended, and of Section 5 of the Federal Trade Commission Act by [another plumbing manufacturer]. If that company is in fact discriminating in price among competing customers, there would seem to be a substantial possibility that such fact will be disclosed during the course of the pending investigations.

Very truly yours,

STANLEY M. LIPNICK.

U.S. GOVERNMENT PRINTING OFFICE: 1968